IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-476

TOWNS OF NORWOOD, CONCORD AND WELLESLEY, MASSACHUSETTS,
Petitioners,

v.

BOSTON EDISON COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BOSTON EDISON COMPANY'S RESPONSE TO READING MUNICIPAL LIGHT BOARD'S MEMORANDUM IN SUPPORT OF PETITION FOR CERTIORARI

GEORGE F. BRUDER
J. MICHEL MARCOUX
BRUDER & GENTILE
1201 Connecticut Avenue, N.W.
Suite 708
Washington, D.C. 20036

Of Counsel:

VICTOR H. KAZANJIAN
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

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Boston Edison Company ("Edison") here answers the memorandum of the Reading Municipal Light Board ("Reading") in support of the petition for a writ of certiorari of the Towns of Norwood, Concord and Wellesley, Massachusetts. Edison previously opposed the Towns' petition. Reading's memorandum supporting the petition was

not filed in time for Edison to respond in its previous opposition.

This case is not worthy of the Supreme Court's attention under the standards of this Court's Rule 19. The D.C. Circuit merely held that the Federal Power Commission (now the Federal Energy Regulatory Commission) could not impose new filing requirements on a utility after its filing had been submitted in accordance with existing filing requirements. That principle is consonant with existing law.[1] There is no conflict of authority among circuits on the subject and no conflict with decisions of this Court. There certainly was no departure below from the accepted and usual course of judicial proceedings.

Reading seeks to make the case "certworthy" by developing a theory of the D.C. Circuit's holding that cannot be found on the decision's face. Reading develops its theory along these lines:

The Commission, Reading says, was not applying a mechanical four month or seven month test of Period I staleness when it rejected Edison's Rate S-4 filing, but was merely applying the test as articulated in Order No. 487: whether the Period I data were the most recent available data for a 12 month period. 50 F.P.C. 125-30, *reh. denied*, 50 F.P.C. 736 (1973), *aff'd*, *American Public Power Ass'n* v. *FPC*, 522 F.2d 142 (D.C. Cir. 1975). Reading's argument appears to be that the Commission, in rejecting the filing, made a factual determination that any Period I data more than seven months old could not possibly be Edison's most recent available data. That argument necessarily rests on one or the other, or both, of two premises: (1) that the Commission applied the Order No. 487 test to the particular facts of Edison's

[1] *Mississippi River Fuel Corp.* v. *FPC*, 202 F.2d 899, 902-03 (3d Cir.), *cert. dismissed*, 345 U.S. 988 (1953); *Atlantic Seaboard Corp.* v. *FPC*, 201 F.2d 568, 571 (4th Cir. 1953).

filing; or (2) that the Order No. 487 test implied a four month or seven month mechanical test. The Commission's conclusion in that respect, Reading asserts (at 4), is "consistent with" the Commission's rejection of filings in two other proceedings, one in which the Period I data were over ten months old and the other in which they were over a year old.[2] Reading treats the Commission's acceptance of filings in at least a half dozen other proceedings in which the data were over seven months old as aberrations—mere unfortunate lapses of enforcement of the Order No. 487 test.[3] Thus, Reading reaches its own interpretation of what the D.C. Circuit actually held: that if an administrative agency lapses in the enforcement of its regulations, it is thereafter foreclosed from resuming enforcement (at 7). That, of course, is not what the D.C. Circuit said that it held. *Boston Edison Co.* v. *FPC*, 557 F.2d 845, 849 (1977).

The basic flaw in Reading's version of the D.C. Circuit's holding is that it is premised on a number of critical facts that do not exist here:

1. The Commission unmistakably was applying a mechanical four month test when it rejected Edison's S-4 filing. The rejection letter order said (certiorari petition at 12a-13a):

> Our review of your filing indicates that because the Period I test data which you provided is out of date, we cannot properly evaluate the propriety of your

[2] *Minnesota Power & Light Co.*, 51 F.P.C. 1422, *reh. denied*, 51 F.P.C. 2135, 52 F.P.C. 617 (1974); *Public Service Company of New Hampshire*, Docket No. E-9290, April 11, 1975, *reh. denied*, June 4, 1975, 5 Fed. Power Serv. 5-818.

[3] *Southern California Edison Co.*, 51 F.P.C. 951, *reh. denied*, 51 F.P.C. 1406, 1827 (1974); *Louisiana Power & Light Co.*, 51 F.P.C. 1290 (1974); *Rockland Electric Co.*, Docket No. E-9001, September 27, 1974 order (unreported); *Commonwealth Edison Co.*, 52 F.P.C. 1072, *reh. denied*, 52 F.P.C. 1864 (1974); *Central Vermont Public Service Corp.*, Docket No. E-9040, December 5, 1974 order (unreported); *Montaup Electric Co.*, 52 F.P.C. 1865 (1974).

> proposed rate increase. Therefore, please submit actual data for the period ending no earlier than four months prior to the date of filing of the proposed increase.

As authority for its rejection of the filing, the Commission cited its notice of proposed rulemaking, which had been issued three weeks before, inviting public comment on a new four month mechanical test and *Interstate Power Co.*, Docket No. ER76-70, September 10, 1975 (unreported; *see* certiorari petition at 46a), which had been issued a week after the notice of proposed rulemaking, commencing immediate application of the proposed four month test before its adoption. That the Commission actually was prematurely applying the four month test in the proposed regulations was conclusively demonstrated in *Arkansas Power & Light Co.*, Docket No. ER76-110, October 7, 1975 (unreported letter order; *see* Edison's opposition at A-1), in which it rejected a rate whose Period I had ended only five months and 18 days before the filing date.

2. The Commission's letter order rejecting Edison's filing and its subsequent order denying rehearing made no pretext of examining the particular facts of Edison's case to determine if the Period I data were the most recent available. The only evidence before the Commission on the availability of Period I data to Edison was the prepared direct testimony of Edison's witness Ralph M. Kelmon, submitted under affidavit with the filing. Mr. Kelmon testified that "Period I is calendar year 1974 which is the most recent 12 consecutive months for which actual data are available." Edison repeatedly cited Mr. Kelmon's testimony to the Commission and the D.C. Circuit in the litigation below. Reading's statement that "Edison has never done more than hint that perhaps its Period I data complied as filed" (at 6) is—to put it with restraint—inaccurate in the light of Mr. Kelmon's testimony and its use below. If Reading considers Mr. Kelmon's statement to be merely a "hint" that Edison's data "perhaps" complied with the Commission's requirements, one wonders what sort of statement it would be prepared to accept as a direct representation of that fact.[4]

3. There is no basis for Reading's implication that the Commission before *Interstate* had applied a four month or seven month limit as a kind of rule of thumb under the Order No. 487 test. Reading seeks support for a seven month limit in two cases, *Minnesota Power & Light Co.*, 51 F.P.C. 1422, *reh. denied*, 51 F.P.C. 2135, 52 F.P.C. 617 (1974) and *Public Service Company of New Hampshire*, Docket No. E-9290, April 11, 1975, *reh. denied*, June 4, 1975, 5 Fed. Power Serv. 5-818. In both cases the Commission rejected filings for staleness of Period I data. In *Minnesota* the Period I data were over ten months old; in *New Hampshire*, over 14 months old. Neither case said anything about a four month or seven month test. Reading thus is able to assert only that the cases are "consistent with" a seven month test (at 4). By that, Reading evidently means that the Commission *could* have been applying an unstated seven month test in each case. But then it could also have been applying an unstated eight month, nine month or ten month test, under none of which would Edison's S-4 filing have been rejected.

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[4] This Court would be misled if it were to accept Reading's representation (at least by implication) (at 6) that data submitted by Edison to the Commission and the Securities and Exchange Commission and maintained for internal reporting were capable of rapid development into a cost of service analysis meeting Commission standards. It took Edison a full four months to rework and refile its rate application after its rejection, although it had already performed significant parts of the work in the earlier filing and had every incentive to move as quickly as possible (it was potentially losing needed rate increase revenues for each day of preparation). The four months were met only by hiring outside consultants to develop computer applications and to take over much of the cost of service work—a step that Edison immediately realized was necessary when it received the advice that it must comply with a four month test.

More likely, it acted on the basis of the particular facts presented, as contemplated in Order No. 487. In *Minnesota* the filing utility had volunteered in its filing letter that "if required by the Commission, the Company will prepare an updated cost of service presentation for Period I"—in effect, an admission that more recent data were available. Certiorari petition at 25a. *New Hampshire* was the only case in which the Period I data were substantially over a year old, so that even a calendar year bookkeeping justification was foreclosed there. Neither *Minnesota* nor *New Hampshire* carry the freight of Reading's claim. No case exists prior to *Interstate* in which a rate was rejected for staleness of Period I data that were the age of Edison's Period I data or less.

4. Reading asserts that *Minnesota* and *New Hampshire* are "the only cases known in which the FPC has addressed this issue" of Period I staleness (at 4). Reading evidently has overlooked two cases in which the issue was explicitly addressed and the filing *accepted* over the wholesale customers' objections. In one of those cases the Period I data were one year and two days old; in the other, seven months and 30 days old. The two overlooked cases demonstrate positively that no four month or seven month test was implied in the Order No. 487 regulations. The facts are these:

(a) The first overlooked case, *Southern California Edison Co.*, 51 F.P.C. 951, *reh. denied*, 51 F.P.C. 1406, 1827 (1974), is particularly interesting because it offers an early interpretation of the Commission's Order No. 487 regulations.[5] Following close on the heels of *Minnesota*, it involved, like *Minnesota*, a 1972 test year. Read together, the two cases demonstrate that the Commission did not regard data that were over seven months old as inherently incapable of meeting the most recent data available test.

[5] Reading should have been aware at least of this case, since its attorneys represented the unsuccessful wholesale customers there.

The rate in *Southern California* was filed on January 2, 1974, so that the 1972 Period I was just over a year old. The Commission inquired of the filing utility why more recent Period I data were not available. The filing utility answered that three items of data were kept on its books only on a calendar year basis. Certiorari petition at 44a. Upon that representation, the Commission accepted the rate for filing. Applying for rehearing, a group of wholesale customers claimed staleness of the Period I data as a ground for rejection.[6] The Commission, explicitly noting the customers' contention "that Edison's rate filing fails to comply with the requirements of the Commission's Regulations and that therefore the rate filing should be rejected," denied the application for rehearing on the ground that the customers had "presented no additional information subsequent to our March 1, 1974 order to indicate that [Southern California] Edison has not met these requirements." 51 F.P.C. at 1407. The Commission's handling of this case establishes its original intention under its Order No. 487 regulations to proceed on the basis of the particular facts presented. If it had found a seven month test implicit in those regulations, it could not have acted as it did.

(b) The Period I staleness issue was also specifically addressed in *Commonwealth Edison Co.*, 52 F.P.C. 1072, *reh. denied*, 52 F.P.C. 1864 (1974). The filing was made on August 30, 1974; Period I was calendar year 1973, so that the Period I data were almost eight months old at the filing. According to the Commission's order in the case,

[6] The wholesale customers said in their March 29, 1974 application for rehearing in Docket No. E-8570 (at 4-5):

> It is apparent from SCE's February 13, 1974 letter to the Commission that the data for a much more recent period was available, it simply was not in a convenient form for filing. This is not sufficient justification for failure to comply with this regulation. Allowing SCE to use a stale Period I test year does not square with the Commission's stated intent to set rates based on a company's most current costs.

"The Cities allege that the filing by ComEd should be rejected because . . . it does not comply with § 35.13(b)(4)(iii) of the Commission's Regulations which requires Period I data to be supplied for the most recent 12 months that data is available." 52 F.P.C. at 1073. Answering the Cities, "ComEd argued that rejection would be erroneous on the ground it had not complied with § 35.13(b)(4)(iii) since ComEd had filed Period I data for the most recent period the data was available." 52 F.P.C. at 1073. On the question so posed, the Commission accepted the filing. Again, it could not have done so if it had thought that data over seven months old were necessarily not the most recent available data under the Order No. 487 test.

5. There were at least six cases in which the Commission accepted filings whose Period I data were more than seven months old. In the two cases discussed immediately above, *Southern California* and *Commonwealth Edison*, the Commission recited and rejected wholesale customers' complaints that the Period I data were stale. In the four others (see footnote 3 page 3 above), it evidently did not occur to the wholesale customers to claim staleness.[7] Nor did it occur to the Commission that the filings violated any seven month test implied in the Order No. 487 regulations. The Commission's acceptance of the six filings was not a matter of non-enforcement of a previously proclaimed regulation or standard. After all, Order No. 487 had explicitly rejected mechanical tests of Period I staleness in favor of the more flexible "most recent . . . actual data" formulation. 50 F.P.C. at 130. And no later rulemaking or interpretative order had proclaimed or applied a mechanical test prior to Edison's filing. The Commission's acceptance of the six filings, far from being an oversight, was a deliberate application of the Order No.

[7] In two of the four cases, *Central Vermont* and *Montaup*, the wholesale customers were represented by Reading's attorneys, to whom the implication in the Order No. 487 regulations of a seven month test evidently was not as clear then as it is now.

487 regulations consistent with their language and the descriptive terms of the promulgating order.

6. The D.C. Circuit therefore was not called upon to hold, and did not hold, that the Commission was barred from enforcing regulations by a past lapse of enforcement. Nor was it asked to substitute its interpretation of an ambiguous regulation for the Commission's interpretation. Rather, it was called upon to hold, and held, that "calendar year cost-of-service data for Period I had been customarily received by the FPC in relation to rate increase filings" and that "the earliest notice of any change in the standard was subsequent to petitioner's filing . . .". 557 F.2d at 848-49. In other words, the court merely applied the familiar doctrine that when an administrative agency "decides to reverse its course, it must give notice that the standard is being changed . . . and apply the changed standard only to those actions taken by parties after the new standard has been proclaimed as in effect." 557 F.2d at 849. *See Atchison, Topeka & Santa Fe Railway Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 808 (1973); *Office of Communication, United Church of Christ* v. *FCC*, 560 F.2d 529, 532 (2d Cir. 1977).

7. Nor was the D.C. Circuit called upon to hold that, under the Order No. 487 regulations and their subsequent interpretation by the Commission, the preceding calendar year would be inevitably acceptable as Period I. Edison has not asserted that its Period I met the Order No. 487 requirements because it was based on the preceding calendar year; it has claimed that its filing meets the Order No. 487 requirements because the preceding calendar year data that it used for Period I were the most recent available for that purpose. The Commission's previous practice under the Order No. 487 regulations established that previous calendar year data would be acceptable if the filing utility could represent (as Edison could and did) that they were the most recent available data. Edison

relied upon those orders in preparing its filing. The Commission then reversed course and held as a matter of policy, without reference to the circumstances of particular cases, that any data more than four months or seven months old could not be represented as the most recent available. The D.C. Circuit held that such reversal, without notice or explanation, was an arbitrary and abusive administrative act. 557 F.2d at 849.[8]

That conclusion is reasonable on the facts presented. The case presents no new or unsettled issue of law. Therefore, the petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE F. BRUDER
J. MICHEL MARCOUX
BRUDER & GENTILE
1201 Connecticut Avenue, N.W.
Suite 708
Washington, D.C. 20036
Telephone: (202) 452-1985
Attorneys for
Boston Edison Company

Of Counsel:

VICTOR H. KAZANJIAN
Vice President and
General Counsel
Boston Edison Company
800 Boylston Street
Boston, Massachusetts 02199

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[8] Reading claims in its opening (at 2) that the D.C. Circuit committed "several" errors of fact, but, when it gets down to cases, alleges only one (at 4 n.2), which turns out to be a difference of legal conclusion rather than an error of fact. The facts stated in the opinion are correct.